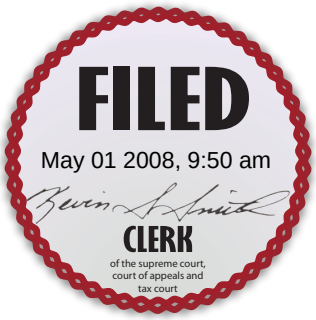

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IN THE
COURT OF APPEALS OF INDIANA

MINDY TROXAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 67A01-0708-CR-404
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Diana J. LaViolette, Judge
Cause No. 67C01-0212-FA-177

May 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Mindy Troxal appeals following her conviction for Battery Causing Death,[1] a class A felony. Troxal presents two issues for our review:

1. Did the trial court abuse its discretion in the admission of evidence?

2. Did the trial court abuse its discretion in ordering restitution?

We affirm.

Melissa Byrd had three children, including three-year-old K.B. In November 2002, Byrd began using Troxal for childcare so that she could return to work. On December 11, 2002, after putting her oldest child on the bus for kindergarten, Byrd took K.B. and her infant son to Troxal's home. K.B. was acting fine the night before and the following morning when Byrd dropped her off at Troxal's home.

At approximately 2:50 p.m. that day, Troxal called Byrd and told her that K.B. had fallen asleep and could not be awakened. Byrd immediately left work, but because she was thirty minutes from Troxal's home, she called her mother and sent her to Troxal's residence. When Byrd's mother arrived at Troxal's home, K.B. was naked and unconscious. Byrd's mother began CPR, but K.B. was unresponsive. Troxal then called 911. K.B. was taken to a local hospital and subsequently life-lined to Methodist Hospital in Indianapolis.

K.B. was in intensive care for three or four days and never regained consciousness. Physicians had control over all of K.B.'s bodily systems. After K.B. stopped responding to treatment, doctors informed her family that she had no chance of

[1] Ind. Code Ann. § 35-42-2-1(a)(5) (West, PREMISE through 2007 1st Regular Sess.).

survival. The decision was made to remove K.B. from life support, and she died shortly thereafter.

During an investigation, Troxal spoke with police and explained that K.B. had wet her pants so she had undressed her and allowed her to play naked.[2] Troxal claimed that she then heard a thump and found K.B. on the floor. Troxal stated that she attempted to wake K.B., but could not.

An expert witness testified that the injuries sustained by K.B. were most likely inflicted within a maximum of up to two to three hours before she became unconscious. During that time period, K.B. was in Troxal's sole care. Dr. Michael Turner, a pediatric neurosurgeon who treated K.B., testified that K.B.'s injuries were consistent with shaken baby syndrome and concluded that K.B.'s "fate was sealed at the time of the injury." *Transcript, Vol. II* at 24.

At trial, Dr. Turner testified that he was familiar with K.B.'s care and explained that she had been admitted to Methodist Hospital by his partner, Dr. Ron Young. When Dr. Turner testified that Dr. Young had performed a craniotomy on K.B., Troxal objected on hearsay grounds. The State also offered *State's Exhibit* 34, Dr. Turner's operative report for a procedure he performed on K.B., which included an operative report dictated by Dr. Young following the craniotomy procedure he had performed. In Dr. Young's report, he described K.B.'s preoperative diagnosis as "acute subdural hematoma" and

[2] K.B. was in the process of potty training and had been having accidents while in Troxal's care. These accidents, which included K.B. wetting on Troxal's couch, upset Troxal so much that Troxal's husband suggested that she not watch Byrd's children any longer. Troxal, however, continued to babysit Byrd's children.

explained that a craniotomy was performed to "evacuate" the subdural hematoma. *State's Exhibit* 34. Troxal objected to the admission of this evidence on hearsay grounds. Over Troxal's objection, Dr. Turner was permitted to testify as to Dr. Young's diagnosis and the procedure he performed on K.B. shortly after she was admitted to the hospital. Dr. Young did not testify at trial.

On December 18, 2002, the State charged Troxal with battery causing death as a class A felony. The State sought and was granted permission to amend the information on January 15, 2003. Following a three-day jury trial beginning February 18, 2004, Troxal was found guilty as charged. On March 22, 2004, the trial court sentenced Troxal to thirty years with six years suspended. Troxal filed a notice of appeal on April 20, 2004, but appellate counsel was not appointed to pursue the appeal until October 4, 2007. This court granted Troxal's petition for permission to file a belated appeal on November 20, 2007.

1.

Troxal argues that the trial court erroneously admitted hearsay evidence about Dr. Young's diagnosis that K.B. suffered an acute subdural hematoma and the craniotomy procedure performed by Dr. Young. Specifically, Troxal challenges Dr. Turner's testimony referencing Dr. Young's findings and the procedure Dr. Young performed and *State's Exhibit* 34, which included the operative report dictated by Dr. Young regarding the same.

Our standard of review for the admissibility of evidence is well established. The admission or exclusion of evidence lies within the sound discretion of the trial court and

is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. *Id*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id*.

Troxal argues that Dr. Turner's testimony concerning Dr. Young's diagnosis of an acute subdural hematoma and the fact that Dr. Young had performed a craniotomy and that portion of *State's Exhibit* 34 concerning the same constituted inadmissible hearsay. Troxal asserts that Dr. Young's diagnosis was significant to establishing the timing of when K.B.'s injury was inflicted. Troxal's theory of defense was that someone other than herself was responsible for K.B.'s injury. As K.B. was in Troxal's sole care from shortly after 10:00 a.m. until K.B. became unconscious around 3:00 that afternoon, Troxal sought to establish that the injury was inflicted prior to 10:00 a.m. Expert testimony at trial explained that there are different ages of subdural hematomas. When suffering from a chronic subdural hematoma, time will pass before the manifestation of symptoms. Where a person is suffering from an acute subdural hematoma, symptoms are more immediate, occurring upon the infliction of the injury or within two to three hours thereafter.

Even assuming the challenged evidence constituted inadmissible hearsay, the admission of that evidence was harmless in that it was merely cumulative of other evidence admitted and not objected to by Troxal. *See Pavey v. State*, 764 N.E.2d 692

(Ind. Ct. App. 2002), *trans. denied*. Indeed, in *State's Exhibit* 33, Dr. Turner's death summary, K.B.'s cause of death is listed as "acute subdural hematoma". Also included in that death summary are references to the craniotomy performed by Dr. Young and a copy of the operative report dictated by Dr. Young after he performed the craniotomy on K.B. Additionally, *State's Exhibit* 30, the autopsy report, also makes references to the fact that a craniotomy was performed.[3] Thus, Dr. Turner's testimony regarding Dr. Young's diagnosis and the steps he took for treatment and that portion of *State's Exhibit* 34 concerning the same were cumulative of other evidence in the record. Troxal was therefore not prejudiced by the admission of the challenged evidence as it was merely cumulative of other evidence in the record. *See Willis v. State*, 776 N.E.2d 965 (Ind. Ct. App. 2002) (holding that admission of videotape was harmless error as tape was merely cumulative of testimony).

Further, where a conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood that the challenged evidence contributed to the conviction, the improper admission of evidence is harmless. *Pavey v. State*, 764 N.E.2d 692. Here, there was evidence concerning the severity of K.B.'s injury. An expert testified that the injury inflicted upon K.B. likely occurred within a short time before she became unconscious, i.e., no more than two to three hours before her demise. The same expert testified that the severity of the injury suffered by K.B. could not have been caused by a fall as alleged by Troxal, but rather was

[3] Dr. Turner testified that a craniotomy would be performed only for treatment of an acute subdural hematoma, not a chronic subdural hematoma.

consistent with falling out of a second story window or a high speed automobile crash. In his expert opinion, K.B.'s injury was sustained as a result of shaking or blunt force trauma. It was undisputed that K.B. was in Troxal's sole care during the time-frame within which the fatal injury was sustained. Any error in the admission of the challenged evidence was therefore harmless. *See id.* (holding that verdict was supported by substantial independent evidence of guilt, including testimony identifying the defendant as perpetrator and DNA evidence, such that any error in the admission of the challenged evidence was harmless).

2.

Troxal argues that the trial court's restitution order erroneously includes items that are not supported by the record and items for which the victim's family has already been reimbursed.

Prior to sentencing, the State tendered a proposed restitution order that provided for Troxal to pay $6,167.39 to John and Melissa Byrd (K.B.'s parents), $200 to Linda Gregory (K.B.'s grandmother), $100 to Melynda Fenwick, and $3,547.51 to the Indiana Criminal Justice Institute (ICJI). The restitution to be paid to K.B.'s parents was itemized as follows: $149.40 for money paid on a funeral bill; $400 for a burial plot; $39.00 to Dr. Young; $19.80 to Dr. Turner; $11.26 to Dr. Beaton; $28.48 to Emergency Medical Group; $1,570.75 for John's lost wages; $1,066.00 for Melissa's lost wages; and $2,882.70 for a headstone. Of the $3,547.51 paid to ICJI, $500 was paid to K.B.'s family for reimbursement of funeral expenses. Troxal filed an objection to the State's proposed restitution order, challenging the allotment for lost wages of K.B.'s parents, the amounts

to be paid to Linda Gregory and Melynda Fenwick, the evidence supporting the $400 amount for the burial plot, and an amount of $2,011 for funeral expenses that Troxal asserts were written off by the funeral home. During the sentencing hearing, Troxal objected only to the amounts for lost wages and the restitution amounts for Gregory and Fenwick. As part of its oral sentencing statement and written order, the trial court ordered restitution in full as requested by the State.

A trial court has the authority to order a defendant convicted of a felony to make restitution to the family of a victim who is deceased. Ind. Code Ann. § 35-50-5-3 (West, PREMISE through 2007 1st Regular Sess.). Whether to order restitution is a matter within the discretion of the trial court, and thus, the trial court's decision will be reviewed only for an abuse of that discretion. *Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999). We will therefore affirm the trial court's decision if there is any evidence supporting the decision. *Id*.

Restitution is a means of impressing upon the defendant the magnitude of the loss for which she is responsible. *Kotsopoulos v. State*, 654 N.E.2d 44 (Ind. Ct. App. 1995), *trans. denied*. The restitution order must reflect the actual loss incurred by the victim or the victim's family. *Id*. The amount of the actual loss is a factual matter to be determined upon the presentation of evidence. *Kellett v. State*, 716 N.E.2d 975 (Ind. Ct. App. 1999). "'When a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule upon it at the appropriate time, he is deemed to have waived that possible error.'" *Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000) (*quoting Brown v. State*, 587 N.E.2d 693, 703 (Ind. Ct. App. 1992)), *trans. denied*.

Having reviewed the record, we conclude that Troxal has waived her right to claim error relating to the restitution amounts for the burial plot, headstone, and payments made to medical providers. We begin by noting that Troxal does not challenge the validity of an order of restitution for these items; Troxal argues only that there is no evidence to support the amounts. At no time during the proceedings, however, did Troxal object specifically to the restitution amounts allotted for K.B.'s headstone or the payments to medical providers. Troxal has therefore waived the issue for review. *See Mitchell v. State*, 730 N.E.2d 197 (holding defendant waived error in restitution order by failing to object at sentencing hearing). With regard to the $400 restitution award for the burial plot, Troxal, although referencing it in her objection to the State's proposed restitution order filed prior to the sentencing hearing, did not further object to that amount during the sentencing hearing. Troxal has therefore waived this issue for review.[4] *See id.*

Turning to Troxal's claim that there is no evidence showing that the $149.40 ordered reimbursed to K.B.'s parents represents funeral expenses not reimbursed by ICJI with its $500 payment to K.B.'s parents, again, we find that Troxal waived the issue for review by failing to object at the sentencing hearing. *See Kellett v. State*, 716 N.E.2d 975 (holding that by failing to object at sentencing hearing, defendant waived error that ledger admitted in support of restitution order, which contained mathematical errors and duplicate charges, resulted in restitution being ordered in an amount greater than actual expenses).

[4] In any event, included in the record is a certificate of entombment rights which includes a notation, apparently on a post-it note, "$400 for 1 plot". *Appendix* at 164. This expenditure is supported by the evidence.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.